

NO. 49757-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS HAYES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie A. Arend, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH HAYES  
POSSESSED COCAINE WITH INTENT TO DELIVER.

Possession of a controlled substance with intent to deliver requires proof of both drug possession and some additional factor supporting an inference of intent to deliver it. State v. Zunker, 112 Wn. App. 130, 135-36, 48 P.3d 344 (2002) (citing State v. Campos, 100 Wn. App. 218, 222, 998 P.2d 893, review denied, 142 Wn.2d 1006 (2000)). “Washington case law forbids the inference of an intent to deliver based on ‘bare possession of a controlled substance, absent other facts and circumstances.’” State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). There must be substantial corroborating evidence in addition to the fact of possession. *Id.* at 485. Generally this corroborating evidence takes the form of additional factors substantially related to the distribution of drugs, such as large sums of cash, weapons, pagers and cell phones, packaging materials, scales, log or ledgers for recording drug sales, and controlled substance separately packaged for sale. Campos, 100 Wn. App. at 223-24 (large sum of cash, pager, cell phone in addition to large quantity of cocaine); State v. Miller, 91 Wn. App. 181, 955 P.2d 810 (drugs packaged for individual use, empty packaging materials, sales list, knife supported intent to deliver), review denied, 136 Wn.2d 1016 (1998); State v. Hagler,

74 Wn. App. 232, 236, 872 P.2d 85 (1994) (large amount of cash supported inference that juvenile possessed 24 rocks of cocaine with intent to deliver); State v. Lane, 56 Wn. App. 286, 297-98, 786 P.2d 277 (1989) (large sum of cash and a gram scale supported inference of intent to deliver).

The State may not rely solely of the quantity of drugs possessed to establish intent to deliver. Absent some other factor, possession of a larger quantity of drugs than typical for personal use is not sufficient to support an inference of intent. State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994); Brown, 68 Wn. App. at 485). These other factors were missing from the evidence in this case, and the officers' testimony that the amount of cocaine discovered in the trunk of the car was larger than typical for personal use could not alone establish intent to deliver. The cocaine was contained in a single baggie, not packaged separately for sale, and no cash, weapons, packaging materials, scales, cell phones, or log books were found in the car or in Hayes's possession. See 2RP 127, 3RP 179-80.

The State argues in its brief that Hayes acted as a business owner in an "open-air market" selling cocaine from the front of his car, "[h]e kept a small quantity of inventory available for immediate sale in the front of his car and his remaining inventory was safely stored in ... the trunk of

the black Jaguar. When inventory was exhausted or running low in the storefront, the defendant went to the trunk to restock and deposit money.” Br. of Resp. at 9-10. While an element of the offense may be proved by circumstantial evidence, the State cannot meet its burden of proof through pure speculation. State v. J.P., 130 Wn. App. 887, 893, 125 P.3d 215 (2005); State v. Prestegard, 108 Wn. App. 14, 22, 28 P.3d 817 (2001). On appeal, the reviewing court must be convinced that substantial evidence supports the State’s case. Id. at 22-23. Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” Id. (quoting State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)). Substantial evidence requires more than “guess, speculation, or conjecture.” Id. To rise above speculation and conjecture, evidence must support a reasonable inference. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15, review denied, 138 Wn.2d 1014 (1999).

The evidence at trial does not support the inferences the State suggests in its brief. There was evidence that an unnamed informant purchased cocaine from Hayes more than two months prior to his arrest. There was also evidence that Hayes was seen several times in the El Hutcho’s parking lot over the course of the surveillance operation. No one testified as to any specific dates or number of times he was seen there, or

even as to the most recent time such behavior had been observed, however. 2RP 63-64, 73, 88. And while the officers gave their opinion that the actions they observed were consistent with drug transactions, there was no evidence that either Hayes or anyone else observed during the investigation was ever searched and found to have controlled substances or other indicia of drug transactions. 2RP 64, 100. There was no testimony that Hayes deposited money in the trunk of the car. 2RP 93-94.

The State cites to three cases in an attempt to establish that the evidence was sufficient to prove intent in this case. Br. of Resp. at 11-12. Each of these cases is distinguishable. First, in State v. Thomas, 68 Wn. App. 268, 843 P.2d 540 (1992), the issue before the court was whether admission of testimony about the defendant's drug activities outside the restaurant where he was arrested violated ER 404(b). On the evening he was arrested, officers saw Thomas engage in three drug transactions. Thomas was arrested, and after a struggle he was searched. Officers found the pill bottle they had observed during the transactions in Thomas's pocket. It contained 95 hits of rock cocaine. Thomas, 68 Wn. App. 270-72. The Court of Appeals concluded the trial court did not abuse its discretion in admitting testimony about the drug transactions, because they were logically relevant to the issue of intent, and it provided the jury with a complete picture of what occurred that evening. Id. at 273-74. Here, on



the other hand, Hayes was not arrested at the scene of any alleged drug transactions. In fact, there was no testimony that Hayes engaged in any behavior indicative of drug transactions on the day of his arrest.

Next, the State relies on State v. Hubbard, 27 Wn. App. 61, 615 P.2d 1325 (1980). In that case, the defendant was charged with delivery of a controlled substance, and he presented a defense of entrapment. He sought to impeach the arresting officer with details of the arresting officer's drug habits, but the trial court would not allow the evidence. This Court found it was error to preclude the defendant from exploring the extent of the officer's drug habit in presenting his defense of entrapment. Hubbard, 27 Wn. App. at 63-64. The Court also held that the trial court did not abuse its discretion in admitting evidence of an alleged drug sale by the defendant six years earlier to rebut the defendant's denial of predisposition to commit the crime. Id. at 64. Nothing in Hubbard addresses the issue here, which is whether there were sufficient corroborating factors beyond mere possession to establish intent to deliver.

Finally, the State cites to State v. Hernandez, 85 Wn. App. 672, 935 P.2d 623 (1997). This is another case involving convictions for delivery of a controlled substance, rather than possession with intent to deliver. Police officers observed what appeared to be drug deliveries, immediately contacted the defendants, and found controlled substances.

The issue decided by the Court of Appeals was whether the evidence supported an inference that the objects delivered were also controlled substances. Hernandez, 85 Wn. App. at 674-75. The Court noted that fact finders may infer that a defendant possessed a controlled substance with intent to deliver based on evidence that, before the arrest, he or she delivered a controlled substance to another person. It concluded it was similarly reasonable to infer the defendants delivered cocaine when, just minutes later, police found cocaine in their possession. Id. at 676. Hernandez does not support the State's argument here, because there was no evidence that Hayes had delivered a controlled substance just prior to his arrest.

Constitutional due process required the State to prove every element of the charged offense beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Given the lack of substantial corroborating evidence that Hayes intended to deliver the cocaine found in the car the day after his arrest, his conviction for possession of a controlled substance with intent to deliver must be reversed.

B. CONCLUSION

For the reasons addressed above and in the opening brief and in Hayes's statement of additional grounds for review, this Court should reverse Hayes's convictions.

DATED July 27, 2017.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Catherine E. Glinski", written in a cursive style.

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Certification of Service by Mail

Today I caused to be mailed copies of the Reply Brief of Appellant  
in *State v. Demetrius Hayes*, Cause No. 49757-3-II as follows:

Demetrius Hayes DOC# 939189  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Manchester, WA  
July 27, 2017

**GLINSKI LAW FIRM PLLC**

**July 27, 2017 - 4:04 PM**

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